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Critical Notes

AN ANALYSIS OF THE HAMMURABI CODE¹

The Laws of Hammurabi have been compared with the Mosaic Torah (Oettli, Mueller), with the XII Tables (Mueller), with the Talmud (Linfield, *AJSL*, XXXVI, pp. 40 ff.), but none of these groups of laws throws any light whatsoever on the arrangement of the Babylonian laws.

Professor Lyon, whose analysis has been accepted as the best, refrains from comparing the code with any other body of laws. His paper proved beyond any reasonable doubt that the laws were grouped under two main headings: Property (6-126) and Persons (127-282).

The purpose of this paper is primarily to analyze the code and incidentally to indicate some unexpected coincidences between the ancient Babylonian and the classical Roman jurisprudence.

ANALYSIS OF THE CODE

I. THE LAW OF PROCEDURE (1-5)¹

1. False accusation (1-2)
2. False witness (3-4)
3. False decision (5)²

II. THE LAW OF PROPERTY (6-126)³

1. *The possession of property* (6-52)⁴
 - A. Illegal Possession (6-25)⁵
 - a) Unwitnessed theft (6-20)⁶
 - 1) of things (6-13)⁷
 - a. sacred and public (6-8)⁸
 - b. private (9-13)
 - 2) of persons (14-20)
 - a. free (14)⁹
 - b. slave (15-20)¹⁰

¹ Abbreviations: Cuq (Ed. Cuq: *Le Institutions Juridiques des Romains*², Paris, 1904-8); D (*Justiniani Digesta*); G (Gaii *Institutionum juris civilis commentarii*, IV); Karlowa (O. Karlowa: *Roemische Rechtsgeschichte*, Leipzig, 1885-1901); Roby (H. J. Roby: *Roman Private Law in the Time of Cicero and the Antonines*, Cambridge, 1902). Literature on the structure: Kohler, Peiser, Ungnad: *Hammurabi's Gesetz*, 1904-9; D. G. Lyon (in: *Jour. Amer. Or. Soc.*, XXV, pp. 248 ff.); D. H. Mueller: *Die Gesetze Hammurabis*, etc., Wien, 1903; S. Oettli: *Das Ges. Ham. und die Torah Israels*, Leipzig, 1903.

- b) Witnessed theft (21-25)
 - 1) violent (21-24)¹¹
 - 2) clandestine (25)¹²
 - B. Legal Possession (26-52)
 - a) Benefice of public lands (26-41)¹³
 - 1) conditional possession (26-31)¹⁴
 - 2) inalienable possession (32-41)¹⁵
 - b) Use of private lands (42-52)
 - 1) rented farm (42-47)
 - 2) mortgaged farm (48-52)¹⁶
 - 2. *Ownership of property* (53-65 ff.).¹⁷ Rights of the owner:
 - 1) Protection against damage caused by: (53-59)¹⁸
 - a. water (53-56)
 - b. cattle (57-58)
 - c. man (59)
 - 2) Lease of land (60-65)
 - 3. *Acquisition of property* (100-126). Forms of commerce:
 - 1) Partnership in trade (100-107)
 - 2) Wine traffic (108-11)
 - 3) Transportation of goods (112)
 - 4) Debt (banking) (113-19)
 - 5) Storage of grain (120-21)
 - 6) Deposit of valuables (122-26)
- III. THE LAW OF PERSONS (127-282)
- 1. *The family* (127-93)
 - A. Marriage (127-61)
 - Slander of wife (127)¹⁹
 - a) The marriage contract (128)
 - b) Dissolution of marriage (129-43)²⁰
 - 1) adultery of wife (129-32)
 - 2) absence of husband (133-36)
 - 3) divorce (137-43)
 - a. by husband (137-40)
 - b. by wife (141-43)²¹
 - c) Domestic restrictions (144-52)
 - 1) personal (144-49)
 - a. restriction of right to take concubine (144-45)
 - b. restriction of right to sell slave wife (146-47)
 - c. restriction of rights over diseased wife (148-49)
 - 2) pecuniary (150-52)
 - a. restriction of rights of heirs (150)
 - b. restriction of seizure for debt (151-52)

- d) Crimes relating to marriage (153-58)
 - 1) connivance of wife with murderer (153)
 - 2) incest (154-58)²²
- e) Breach of promise (159-61)
- B. Inheritance (162-84)
 - a) The estate of the wife (162-64). Heirs:
 - 1) children (162)
 - 2) father's house (163-64)
 - b) The estate of the husband (165-84). Heirs:
 - 1) Grown-up sons (165-76)
 - a. father free (165-71)
 - mother free (165-69)²³
 - mother slave (170-71b)
 - 2) Wife (171c-174)²⁴
 - b. father slave (mother free) (175-76a)
 - 3) Minor children (177)
 - 4) Daughters (178-84)²⁵
- C. Adoption (185-93)
 - a) When can the adopted child be reclaimed? (185-90)
 - 1) not reclaimable (185-88)
 - 2) reclaimable (189-90)
 - b) Inheritance by adopted son (191)²⁶
 - c) Ingratitude of adopted son (192-93)
- 2. *Liability* (194-282)²⁷
 - A. Liability arising from Tort (194-227)²⁸
 - Change of infant by nurse (194)
 - a) Bodily injury or death (195-223)²⁹
 - 1) caused by assault (195-214)
 - a. males (195-208)
 - malicious injury (195; 196-99; 200-205)
 - unintentional injury (206; 207-8)
 - b. females with young (209-10; 211-12; 213-14)
 - 2) caused by malpractice (215-23)
 - a. of surgeon (215-17; 218-20)
 - b. of physician (221-23)
 - b) Pecuniary loss (224-27).³⁰ Malpractice of:
 - a. veterinary doctor (224-25)
 - b. brander of slaves (226-27)
 - B. Liability arising from Contract (228-82)
 - a) Hire of labor (228-77)
 - 1) contract for job (228-67)³¹
 - a. house-building (228-33)
 - b. boat-building (234-35)

- c. navigation (236-40)
- d. agriculture (241-60)
 - ox (241-52)
 - overseer (253-56):
 - farm laborer (257-58)
 - theft (259-60)
- e. shepherding (261-67)
- 2) contract by the day (268-77)³²
 - a. animals (268-70), teams (271-72)
 - b. laborer (273), artisan (274-75)
 - c. boats (276-77)
- b) Purchase of labor (slaves) (278-82)
 - a. contract null (278; 279; 280-81)³³
 - b. rebellious slave (282)

NOTES

¹ Like the Roman *Jus civile*, the Hammurabi Code is divided into 3 sections: *Jus actionum*, *Jus rerum*, *Jus personarum* (usually in reversed order in Roman law).

² Cf. D, XLII, I, 55 (Judex postquam semel sententiam dixit . . . corrigere sententiam non possit).

³ Hammurabi separates sharply "possession" and "ownership" as Roman law did (e.g., D, XLIII, 17, 1.2). (Cf. note 17.)

⁴ The distinction of *justa* and *injusta possessio* was made by Roman authors, although these terms were not considered technical (Roby, I, 453).

⁵ For Hammurabi theft created an illegal possession and was treated under this head; Rome saw in it a form of liability, while modern law considers it a crime.

⁶ Hammurabi and Rome classified theft in *manifestum* and *nec manifestum* (G, III, 184-85); the original punishment of the first in both systems was death, which was later reduced to a heavy fine (for Rome see Cuq, II, 471).

⁷ For the distinction of *res sacrae*, *publicae*, and *privatae*, cf. G, II, 4, et 11.

⁸ On law 7, cf. Karlowa, II, 311 ("So war ein Sklave, ein *filiusfamilias* einer *naturalis*, nicht aber einer *civilis possessio* fähig" . . .).

⁹ Cf. G, III, 199

¹⁰ For theft of slaves, cf. D, XIX, 5, 15, et XLVIII, 15, 6. In Rome the harboring of a *fugitivus familiaris alienus* could be prosecuted with an *actio furti* (cf. Mueller, 192, and references).

¹¹ Cf. G, III, 219 (*vi bonorum raptorum*).

¹² Cf. Roby, II, 217 (*ex incendio rapinae*).

¹³ Feudal tenure, so familiar in the Middle Ages, seems to be unknown in Roman law.

¹⁴ The benefice is forfeited by hiring a substitute (26) or neglect of land for 3 years (30–31). Capture causes a temporary loss of possession (27–29).

¹⁵ The land cannot be transferred by the beneficiary to another person, nor can it be taken away from him without just cause.

¹⁶ "If a corporal object was passed into the possession of the creditor as security for the discharge of an obligation it was properly *pignus*, if it was not put in possession, but treated by agreement as such security, it was *hypotheca*" (Roby, II, 102). Law 48 is a case of *hypotheca*, while 49–52 refer to the *pignus*.

¹⁷ After 53–56, which mark the transition (a usual feature of Hammurabi's juristic technique), we have passed undoubtedly from the subject of possession of real estate to that of ownership of the same. While laws 42–52 treat of the tenant (*šumma awilum eklam ana errešutim ušešema*, 42) in 57–65 ff. the subject becomes the *bêl eklim* and the *bêl kirîm* (*passim*), and tenancy is now considered from the point of view of the owner (*šumma awilum eklam ana kirîm zakapim ana sâkinim iddin* . . . 60).

¹⁸ Cf. with 57 f. the *actio de pastu pecoris* (XII, Tab. and D, XIX, 5, 14, 3), and with 59 the *arborum furtim caesarum actio* (XII, Tab. and Roby, II, 194).

¹⁹ The two great sections of the Law of Persons begin with an article loosely connected with the context (127 and 194). R. Dareste (*Le code Bab. d'Ham.*; *Nouv. Rev. hist. de droit franc. et étr.*, XXVII, 18) remarks on 127: "Ici se trouve un article isolé qui ne paraît guère à sa place." We must admit however that we could not find a more suitable place for these laws.

²⁰ Cf. D, XXIV, 2, 1.

²¹ T. G. Pinches (*Encyclopedia of Religion and Ethics*, V, 722) and M. Jastrow, Jr. ("Older and Later Elements in the Code of Hammurabi," *Jour. Amer. Orient. Soc.*, XXXVI, 1 ff.), deny the right of the wife to take the initiative in a divorce suit. Law 142 proves, however, that the wife could eventually win a divorce suit.

²² A man cannot contract marriage: with his daughter (154), with his daughter-in-law (155), with his future daughter-in-law (156), with his widowed mother (157), and with his widowed stepmother (158). The marriage of brother and sister does not seem to be prohibited (as it was in Roman law). Cf., for *nefariae nuptiae*, Roby, I, 128–29.

²³ Disinheritance of sons was optional at Rome (G, II, 123 ff.; *Just. Instit.*, II, 18, pr.). On gifts to sons, see Cuq, II, 689.

²⁴ We would expect 171c–174 after 176a. Whether this section was accidentally misplaced or actually was intended to appear here we cannot decide.

²⁵ Two classes of daughters are distinguished: (a) religious votaries (178–82). The various designations (entum išippatum; zinnišat zikrum; išippat gagîm; išippatu kadištu; zërmašîtu; išippat ilu Marduk) are not

yet clearly understood (see Lyon in: *Studies in the History of Religions Presented to C. H. Toy*, 1912). (b) daughters by a concubine (?) (*SU.GE-tim*) (183-84).

²⁶ Cf. G, II, 136.

²⁷ If our analysis of laws 194-282 is correct, the parallelism with Roman law is most striking. G, III, 88, classifies the *obligationes* in two groups: *ex contractu* and *ex delicto*. All of Hammurabi's subdivisions of these two groups (in addition to others lacking in the Babylonian law) are found in Roman Law (cf. notes 28, 31, 32).

²⁸ G, III, 182, distinguishes four forms of *obligationes ex delicto*: *furtum*, *rapina*, *damnum*, *injuria*. The first two are considered by Hammurabi as forms of illegal possession (laws 6-25).

²⁹ Cf. G, II, 220 ff.

³⁰ Cf. the *Lex Aquilia* (G, III, 210 ff).

³¹ This contract is the *Locatio conductio operis faciendi* (Roby, II, 174 f.).






³² The Roman *Locatio conductio operarum* (Roby, II, 174).

³³ On law 178 (one of the most interesting of the Code) cf. Cuq, II, 413, and D, XIX, I, 13, 1; XXI, I, 4.

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THE ORIGIN OF THE SIGN URAŠŠU

When the writer was working on his *Origin and Development of Babylonian Writing*, the sign Uraššu, , puzzled him greatly. Delitzsch, the only scholar who had up to that time attempted an explanation of the origin, thought it was composed of , "side," plus , "great"—a theory that did not commend itself. Two forms of the sign are found in the early inscriptions. Urnina, ruler of Lagash in southern Babylonia, writing about 3000 B.C., employs the form , while an undated inscription of about equal age, written probably, as the paleography suggests, in northern Babylonia, uses the form . Neither of these forms suggested at that time a picture of any recognizable object; the writer accordingly fell back upon the meanings for a suggestion. These included the gods Anu, Enmashtu (Ninib), Ibba, and Urash, a storm-cloud, a swarm of fish, a seer, some kind of a band, an all-enveloping garment, and an inclosed place or chamber, besides two words of doubtful translation.